UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 125

Docket No. DE-0752-08-0436-I-1

Laura R. Boltz,

Appellant,

v.

Social Security Administration,

Agency.

July 9, 2009

Marisa L. Williams, Esquire, Englewood, Colorado, for the appellant.

Richard A. Gilbert, Esquire, and Traci B. Davis, Esquire, Dallas, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant and the agency petition for review of the initial decision, issued February 18, 2009, that mitigated the appellant's removal to a letter of warning. For the reasons discussed below, we find that the petitions do not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we, therefore, DENY them. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and REVERSE the initial decision. The appellant's removal is NOT SUSTAINED.

BACKGROUND

¶2 The agency removed the appellant from her Assistant Regional Counsel (General Attorney) position based upon the charge of "inappropriate behavior." Appeal File, Tab 9, subtabs 4l, 4t. The agency specified that, while serving as a Special Assistant U.S. Attorney, the appellant made three false statements to the U.S. District Court for the District of Colorado on July 25, 2007, to explain her need for an extension of time for a filing in an assigned case. Specifically, the agency alleged that the appellant falsely stated that she needed the time extension because the case had been reassigned to her from another attorney after July 13, 2007, that she was unaware that the case had been assigned to her until July 25, 2007, due to a docketing error, and that she was currently working on a matter pending before the Equal Employment Opportunity Commission (EEOC). *Id.*, subtab 4t at 1.

¶3 Following a hearing, the administrative judge mitigated the appellant's removal to a letter of warning, finding as follows: (1) Although the agency used the term "false" in its underlying narrative account of the appellant's misconduct, it was not required to prove specific intent because it properly used the general charge of inappropriate behavior; (2) the agency proved the inappropriate behavior charge by proving that two of the three specified statements were unintentionally inaccurate; (3) the appellant did not prove her affirmative defenses of harmful procedural error, reprisal for equal employment opportunity activity, and gender and age discrimination; and (4) a letter of warning constituted the maximum reasonable penalty under the circumstances of this case. Appeal File, Tab 32. The administrative judge also directed the agency to provide the appellant with interim relief. *Id*. at 23.

¶4 Both the appellant and the agency have petitioned for review. In her petition for review, the appellant asserts that the administrative judge erred in regulating discovery, the admission of evidence, and witnesses, thereby preventing her from obtaining and submitting evidence regarding her

discrimination claims. Petition for Review File, Tab 1 at 2-4. The appellant also asserts that the administrative judge incorrectly analyzed her discrimination and retaliation claims, and erroneously rejected her harmful procedural error allegation. *Id*. at 4-11.

¶5 In its petition for review, the agency asserts that the administrative judge erred in finding that it did not prove all of the specifications and in mitigating the penalty. Petition for Review File, Tab 2 at 5-14.[1]

ANALYSIS

¶6 We first find that the appellant's petition does not provide a basis for granting review. The appellant asserts that the administrative judge erred in regulating discovery, the admission of evidence, and witnesses. Petition for Review File, Tab 1 at 2-4. The appellant claims that these erroneous rulings prevented her from obtaining and submitting evidence regarding allegedly similarly situated comparison employees and the generally hostile work environment that was the subject of her discrimination claims. *Id*.

¶7 The Board has held that, to be considered similarly situated, all relevant aspects of the appellant's employment situation must be nearly identical to those of the comparison employee. *See Deas v. Department of Transportation*, 108 M.S.P.R. 637, ¶ 16 (2008). Here, however, the appellant did not allege that the evidence and witnesses that she sought to obtain and present pertained to attorneys who engaged in inappropriate behavior by making allegedly false

[1] The agency also asserts that it has provided the ordered interim relief and has provided evidence that it has returned the appellant to her position and placed her in pay status as of the date of the initial decision. Petition for Review File, Tab 2 at 1-2, Attachments. The appellant, however, has moved that the agency's petition be dismissed for failing to provide the ordered interim relief, and the agency has moved that this motion be dismissed as untimely filed. Petition for Review File, Tabs 5-7. We find it unnecessary to address these issues in light of our decision to deny the agency's petition for review on the merits. *See Jolivette v. Department of the Navy*, 100 M.S.P.R. 216, ¶ 5 n.1 (2005).

statements in a court filing. Appeal File, Tabs 14, 20; Nov. 19, 2008 Hearing Transcript at 174-79. Thus, the appellant has not established that the administrative judge erred or otherwise abused his broad discretion in regulating the proceeding or admitting evidence. *See Kimble v. Office of Personnel Management*, 102 M.S.P.R. 604, ¶ 10 n.2 (2006); *Fritz v. Department of Health & Human Services*, 87 M.S.P.R. 287, ¶ 15 (2000). In any event, the appellant's petition does not sufficiently explain how any of the excluded evidence would change the result in her appeal. Petition for Review File, Tab 1 at 2-4, 8; *see Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

¶8 The appellant next asserts that the administrative judge incorrectly analyzed her discrimination and retaliation claims and erroneously rejected her harmful procedural error allegation. Petition for Review File, Tab 1 at 4-11. With respect to the discrimination and retaliation issues, the appellant asserts that the administrative judge did not apply the correct burden of proof. *Id*. at 5-8.

¶9 In *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008), the Board held that, in adverse action appeals such as the present case, the agency has already articulated a non-discriminatory reason for its action, the charged misconduct, and it has, therefore, done everything that would be required if the appellant established a prima facie case. Thus, the Board found that prima facie case is irrelevant and the inquiry only concerns the ultimate question of whether, weighing all of the evidence, the appellant met her overall burden of proving illegal discrimination or retaliation. *See id*., ¶¶ 17-18. The initial decision shows that the administrative judge correctly applied this analytical framework, and the appellant's claim to the contrary is without merit. Appeal File, Tab 32 at 14-18.

¶10 The appellant also reiterates her claim that the agency committed harmful procedural error by not authenticating the evidence used against her. Petition for Review File, Tab 1 at 8-11. Reversal of an action under a claim of harmful procedural error is warranted only where procedural error, whether regulatory or

statutory, likely had a harmful effect upon the outcome of the case before the agency. *Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983), *aff'd sub nom. Adams v. Department of Transportation*, 735 F.2d 488 (Fed. Cir. 1984). Here, the appellant has neither identified a violation of any required procedure nor explained how the agency's error in not following the required procedure affected the outcome of the case before the agency. Petition for Review File, Tab 1 at 8-11. We, therefore, find that the administrative judge correctly decided this issue. Appeal File, Tab 32 at 12-13.[2]

¶11 In its petition for review, the agency asserts that the administrative judge erred in not sustaining one of its three specifications and in mitigating the removal penalty. Petition for Review File, Tab 2. We need not reach these issues because we reopen the appeal on our own motion to address the administrative judge's erroneous interpretation of the agency's charges against the appellant. *See Valenzuela v. Department of the Army*, 107 M.S.P.R. 549, ¶ 11 (2007) (the Board will reopen a case, even though the appellant had not raised the issue, where the administrative judge improperly analyzed the charge).

¶12 As discussed above, the agency labeled the appellant's misconduct as "inappropriate behavior." Appeal File, Tab 9, subtabs 4l, 4t. Following the charge in both the proposal and decision notices, the agency set forth "specifications" that alleged that, while serving as a Special Assistant U.S. Attorney, the appellant made three "false" statements to the District Court to explain her need for an extension of time. *Id.*, subtab 4l at 1-2, subtab 4t at 1. The specifications stated that the appellant informed the court that she needed the time extension because the case had been reassigned to her from another attorney

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[2] To the extent the appellant is arguing that the administrative judge abused his discretion by admitting unauthenticated documents into the record, Petition for Review File, Tab 1 at 10, the appellant has not shown any prejudice to her substantive rights, particularly given our determination that the agency failed to prove its charge. *See Karapinka*, 6 M.S.P.R. at 127.

after July 13, 2007, that she was unaware that the case had been assigned to her until July 25, 2007, due to a docketing error, and that she was currently working on a matter pending before the EEOC. *Id*., subtab 4l at 1, subtab 4t at 1. The specification then concluded by stating that "[a]ll three statements were false." *Id*., subtab 4l at 1, subtab 4t at 4.

¶13 After the specifications, the notice of proposed removal set forth a "narrative description of misconduct," that included three sections -- general background, events leading to the appellant's misconduct, and the misconduct of July 25, 2007. *Id*., subtab 4t at 2-3. The events leading to the appellant's misconduct section chronicled the agency's version of the facts surrounding the reassignment of the case in question to the appellant and stated that the appellant was "well aware" and "knew" that the case had been assigned to her in early July 2007. *Id*. at 2. The "misconduct of July 25, 2007" section then discussed the three statements at issue in greater detail, reiterating that the statements were "false," that the appellant "intentionally misstated" the true facts, and that the appellant's explanations of her statements were not credible. *Id*. at 3-4.

¶14 The decision notice similarly set forth the three sections just described in the notice of proposed removal, and included allegations that the appellant made "false" statements, and that she "knew" and was "well aware" that the case had been assigned to her in early July. *Id*., subtab 4l at 2-4. This notice also included the deciding official's view that the appellant's claim, that she was unaware that the case at issue had been reassigned to her in early July 2007, was disingenuous and "unbelievable." *Id*. at 2-3.

¶15 The administrative judge found that the agency's charge did not require it to prove that the appellant intentionally falsified her court submission because the inappropriate behavior charge did not contain a specific intent element, and that the inclusion of the term "false" in the accompanying specifications did not require a different result. Appeal File, Tab 32 at 4. The administrative judge also found that the agency proved its first and third specifications and, therefore,

proved the charge, but further found that the question of the appellant's intent was relevant in assessing the reasonableness of the penalty. *Id*. at 4-12. The administrative judge then found that the agency did not show that the appellant intentionally falsified the submission and that the lack of intent was a significant mitigating factor. *Id*. at 6-7, 11-12, 19-21.

¶16 We find, however, that the agency's charge includes the specific intent required for a falsification charge. In resolving the issue of how a charge should be construed and what elements require proof, the Board examines the structure and language of the proposal notice and the decision notice. *George v. Department of the Army*, 104 M.S.P.R. 596, ¶ 7 (2007), *aff'd*, 263 F. App'x 889 (Fed. Cir. 2008); *James v. Department of the Air Force*, 73 M.S.P.R. 300, 303-04 (1997); *but see O'Keefe v. U.S. Postal Service*, 318 F.3d 1310, 1315 (Fed. Cir. 2002) (only the charge and specifications set out in the proposal notice may be used to justify punishment). Where, as here, the agency has employed a generic label for the charge, the Board must look to the specification to determine what conduct the agency is relying on as the basis for its proposed action. *Lachance v. Merit Systems Protection Board*, 147 F.3d 1367, 1372-72 (Fed. Cir. 1998). If an agency chooses to label an act of misconduct, it is bound to prove the elements that make up the legal definition of that charge. *George*, 104 M.S.P.R. 596, ¶ 7; *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997).

¶17 Although the agency here used the general charge of inappropriate behavior, its specifications and accompanying description of the appellant's actions show that the agency charged the appellant was making false statements to the court in her request for an extension of time. As set forth above, the agency repeatedly used the term "false" in describing the appellant's statements. Appeal File, Tab 9, subtabs 4l, 4t. Further, its conclusion that the appellant was "well aware" that her statements were inaccurate and its use of terms such disingenuous, not credible, and disturbing in rejecting the appellant's explanation of her action support the conclusion that the agency charged the appellant with

intentionally making false statements. *Id*., subtabs 4l, 4t. Indeed, in a later affidavit, the deciding official stated that she decided to remove the appellant from her position based upon the appellant's false statements. Appeal File, Tab 8, subtab 4b at 4.

¶18 We also recognize that the proposal and decision letters include some statements that, taken alone, could support the proposition that the agency did not charge the appellant with intentional falsification. Appeal File, Tab 9, subtabs 4l, 4t. These statements, however, do not overcome the references cited above, that warrant the conclusion that the accompanying specifications and circumstances in their entirety show that the agency charged the appellant with intentional falsification. *See George*, 104 M.S.P.R. 596, ¶ 7.

¶19 Because the agency removed the appellant for making false statements, the agency must prove, by preponderant evidence, that the appellant knowingly provided wrong information with the intention of defrauding, deceiving, or misleading the agency. *Haebe v. Department of Justice*, 288 F.3d 1288, 1305 (Fed. Cir. 2002); *Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617, ¶¶ 8-10 (2007). Whether the element of intent has been proven must be resolved from the totality of the circumstances. *See Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 525, ¶ 9 (2008); *Blake v. Department of Justice*, 81 M.S.P.R. 394, ¶ 27 (1999). Because there is seldom direct evidence on the issue, circumstantial evidence must generally be relied upon to establish intent. *Naekel v. Department of Transportation*, 782 F.2d 975, 978 (Fed. Cir. 1986); *Rodriguez*, 108 M.S.P.R. 525, ¶ 9. A conclusion that an appellant has provided incorrect information, however, does not control the question of intent for purposes of adjudicating a falsification charge. *Rodriguez*, 108 M.S.P.R. 525, ¶ 9; *Mendez v. Department of the Treasury*, 88 M.S.P.R. 596, ¶ 16 (2001).

¶20 Here, the administrative judge has fully adjudicated the issue of the appellant's intent in accordance with this standard, with respect to the two specifications he sustained below. Appeal File, Tab 32 at 6-7, 11-12. The

administrative judge's findings on the issue were based upon credibility determinations that included observations of the appellant's demeanor. *Id*. These findings are entitled to deference. *Haebe*, 288 F.3d at 1301. With respect to the remaining specification, the administrative judge accepted the appellant's claim that she stated a fact that she believed to be true, even though she may have been mistaken in her belief. Appeal File, Tab 32 at 10. This finding was also based upon credibility determinations that included demeanor observation, and it is similarly entitled to deference. *Id*.; *see Haebe*, 288 F.3d at 1301. We therefore find that the agency has failed to prove its charge against the appellant and, consequently, that her removal cannot be sustained.

ORDER

¶21 We ORDER the agency to cancel the appellant's removal and to restore the appellant effective November 23, 2007. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶22 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶23 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶24 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶25 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶26 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.